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No. 84-1213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CAR CARRIERS, INC., et al.,
Petitioners,

v.

FORD MOTOR COMPANY and
NU-CAR CARRIERS, INC.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

FRANCIS J. McCONNELL
135 South LaSalle Street
Suite 4310
Chicago, Illinois 60603
(312) 726-9131
Attorney for Petitioners

March 12, 1985

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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Respondents seek to rationalize this Court's holdings in *Radovich, Klor's* and *Radiant Burners* with the decision of the Court below by both arguing that the complaint does not state a *per se* offense and that the holdings in those cases are limited to *per se* offenses. Neither premise is correct.

Market allocations and group boycotts have always been considered to be illegal *per se*. No market analysis nor proof of market impact is required to establish the unreasonableness of such restraints. They are presumed to be unduly restrictive. *United States v. Topco Associates*, 405 U.S. 596 (1972); *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Here, petitioners alleged that they were eliminated as a Ford transport carrier and that their business was destroyed pursuant to a market allocation

and group boycott among Ford and co-conspirator carriers. This is not a case of unilateral termination by Ford and substitution of a rival carrier. Nor is it a case of Ford simply awarding an exclusive contract for its Chicago transport business. What is alleged is a division and allocation of Ford's transport business among the conspirator carriers pursuant to a combination and scheme which enabled such carriers to acquire the business and assets of target carriers at below market prices (Complaint ¶¶19, 20; A. 36-37; 38-40). The combination drove petitioners and others out of business and prevented them from selling their transport equipment and terminal facilities except at distress prices. *Klor's*, 359 U.S. at 213.

To hold, as did the Court below, that such joint action to carve up and allocate the transport business of target carriers fails to state a claim, either *per se*, or under the Rule of Reason, because of lack of "market injury" is to make a mockery of the antitrust laws. The fact that Ford may benefit temporarily by paying lower transport rates because of the resulting lower capital acquisition and amortization costs of the conspirator carriers cannot justify such concerted activity as "procompetitive." Most conspiracies have actual or perceived economic benefits to the conspirators. Nor can petitioners' destruction be rationalized on the ground that they are only a single carrier "whose business is so small that [their] destruction makes little difference to the economy." *Klor's*, 359 U.S. at 213.*

* Surely, it cannot be denied that a conspiracy between Ford and half of its dealers to eliminate the other half and thereby to acquire their businesses and assets at distress prices would state a claim for relief under the antitrust laws, even if it could be argued that there were substantial economic benefits to both Ford and the conspirator dealers from such elimination and consolidation. The complaint alleges an analogous combination and restraint.

Respondents' attempt to limit this Court's holdings in *Radovich, Klor's* and *Radiant Burners* to *per se* situations is similarly flawed. There is nothing in the language of these decisions to suggest the Court intended to restrict the holding to *per se* cases. If the challenged restraint is deemed unduly restrictive either under a *per se* standard or Rule of Reason analysis, no separate allegation or showing of public injury is required. Here, the Court below equated public injury with market injury and found the complaint deficient for failure to allege an "injury to the market as well," an erroneous holding since this Court has held that "the right of recovery of a plaintiff in a treble damage antitrust case does not depend at all on proving an economic injury to the public." *In re McConnell,* 370 U.S. 230, 231 (1962).

CONCLUSION

For the reasons stated in the Petition and this Reply, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRANCIS J. McCONNELL
135 South LaSalle Street
Suite 4310
Chicago, Illinois 60603
(312) 726-9131
Attorney for Petitioners

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